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No. 90-382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

VILLAGE OF MILFORD,

Petitioner,

v.

PROFESSIONAL LAWN CARE ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 15.7, respondent Professional Lawn Care Association of America ("PLCAA") submits this brief to advise this Court of recent matters which are relevant to the pending petition for writ of certiorari in this case.

On January 14, 1991, this Court granted the petition for writ of certiorari in *Wisconsin Public Intervenor v. Mortier*, Case No. 89-1905. On January 15, 1991, oral argument was held in *COPARR, Ltd. v. City of Boulder*, Case No. 89-1341 (10th Cir.), a case which, like the *Village of Milford* case, raises the issue of preemption of local ordinances by the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") in the context of a local ordinance requiring notification of pesticide application. Later that day, the Tenth

Circuit ordered abatement of the *COPARR* appeal pending this Court's ruling in *Mortier*. *See* Order, *COPARR, Ltd. v. City of Boulder*, No. 89-1341 (10th Cir. Jan. 15, 1991).[1]

In view of these developments, PLCAA now urges this Court to grant the pending petition of Milford for writ of certiorari. While PLCAA initially opposed Milford's petition for writ of certiorari on the ground that the Sixth Circuit had correctly decided the case, current circumstances compel a different conclusion. Only by hearing this case in conjunction with *Mortier* will this Court ensure that the question of FIFRA preemption of local ordinances is addressed comprehensively and in a manner which will avoid needless future litigation.

While the *Village of Milford* case and *Mortier* both involve the broad question of FIFRA preemption of local ordinances, the cases present that question in significantly different factual contexts. *Mortier* involves a local ordinance which requires receipt of a permit before certain pesticide applications may be made. *See Mortier v. Town of Casey*, 154 Wis. 2d 18, 452 N.W.2d 555, 556 (1990); Pet. for Writ of Certiorari, *Wisconsin Public Intervenor v. Mortier*, No. 89-1905, at 15-16 (June 5, 1990). So far as respondent PLCAA can determine, no party to *Mor-*

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[1] Counsel for respondent PLCAA also serves as counsel for appellants in the *COPARR* appeal. The district court in *COPARR, Ltd. v. City of Boulder*, 735 F. Supp. 363 (D. Colo. 1989), had held that a local ordinance requiring notice of pesticide application was *not* preempted by FIFRA. That decision is the only federal decision finding that FIFRA does not preempt local regulation, and it is directly contrary to the decision of the court below in the *Village of Milford* case.

tier has argued that the scheme created by the Town of Casey ordinance does not constitute regulation of pesticide use within the meaning of FIFRA.

In this case, petitioner has made precisely that argument. Petitioner has asserted that the Milford ordinance challenged here regulates "public notice, a matter wholly outside of FIFRA's reach." Reply Br. in Support of Petition for a Writ of Certiorari, at 2; *see also Professional Lawn Care Association v. Village of Milford*, 909 F.2d 929, 932 (6th Cir. 1990).

Thus, even if this Court concludes in *Mortier* that FIFRA *does* preempt local regulation of pesticide use, the FIFRA preemption question arguably may not be settled conclusively. Instead, litigation will undoubtedly ensue about whether ordinances like that challenged here constitute regulation of pesticide use, so as to be included within the preemptive sweep of the statute. As such, there is a significant risk that this Court, and other courts, will again be asked to address the FIFRA preemption question in the future.[2]

Given these circumstances, respondent PLCAA urges this Court to grant the pending petition in this case and to consider this case and *Mortier* jointly.

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[2] This risk is considerable. The argument that local ordinance notification requirements do not constitute regulation of pesticide use has been raised by the Village of Milford in this case, by Montgomery County in *Maryland Pest Control Ass'n v. Montgomery County*, 646 F. Supp. 109, 113 (D. Md. 1986), *aff'd*, 822 F.2d 55 (4th Cir. 1987), and by the City of Boulder in the pending *COPARR* appeal. Moreover, as the Solicitor General noted in his *amicus* brief in *Mortier*, the question of FIFRA preemption of local regulation "arises frequently." Brief for the United States as *Amicus Curiae*, *Wisconsin Public Intervenor v. Mortier*, No. 89-1905, at 5.

See Supreme Court Rule 27.3. In prior terms, this Court has taken and jointly considered cases presently very similar issues, yet arising from different factual contexts, in order to conclusively resolve unsettled areas of law.[3] By following such a procedure in this case, this Court would determine the questions surrounding the preemptive effect of FIFRA with finality, avoid potential future litigation, and advance the interests of judicial economy.

Respondent would note that granting the petition in this case would not delay this Court's resolution of *Mortier*. Respondent is authorized to represent on behalf of petitioner in this case, that, should the pending petition be granted, the parties to this case will comply with the briefing and argument schedule governing *Mortier*.

For the foregoing reasons, respondent PLCAA respectfully urges that this Court grant the petition for a writ of certiorari and hear this case in conjunction with *Mortier*.

Respectfully submitted,

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[3] *See, e.g., Abington School District v. Schempp*, 374 U.S. 203, 205 (1963) ("These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible. While raising the basic questions under slightly different factual situations, the cases permit of joint treatment.").